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No. 707

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In the Supreme Court of the United States

OCTOBER TERM, 1960

KOHLER COMPANY, PETITIONER

v.

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

and

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

No opinion was rendered by the court of appeals. The Decision and Order of the National Labor Relations Board are reported in 128 NLRB No. 122.

JURISDICTION

The order of the court of appeals was entered on November 23, 1960, and a petition for rehearing *en banc*, filed by petitioner, was denied on January 9, 1961 (Pet. 1a-2a). The petition for a writ of certiorari was filed on February 8, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Petitions to review an order of the National Labor Relations Board were filed in two courts of appeals 35 minutes apart on the same day. The Board filed the record in the court in which the first petition had been filed, which concededly gave that court jurisdiction. The question presented is whether that court abused its discretion in denying a motion to transfer the case to the other circuit.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 2-5 of the Petition.

STATEMENT

On August 26, 1960, the Board issued its Decision and Order (128 NLRB No. 122, 46 LRRM 1389), finding that petitioner Kohler Company had engaged in certain unfair labor practices but not in others. The Board found that the Company had refused to bargain in good faith with the respondent Union,[1] in

[1] Local 833, UAW-AFL-CIO.

violation of Section 8(a)(5) of the National Labor Relations Act, by refusing to furnish wage information to the Union for the purposes of collective bargaining, unilaterally putting into effect wage increases after the commencement of a strike, and discharging certain striking employees and transferring certain nonstriking employees without notification or consultation with the Union. In addition, the Board found that the Company violated Section 8(a)(3) by discriminating against certain employees and thereafter failing to offer them reinstatement, and also interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act. The Board found, however, that the Company had not failed to bargain in good faith prior to the strike, and that the strike was thus caused by a dispute over economic matters rather than by unfair labor practices. The Board also found that 77 striking employees had been discharged because of their misconduct during the strike and were therefore not entitled to reinstatement. The Board's order, *inter alia*, required the Company to bargain in good faith with the Union, to furnish the Union with various wage data, and to reinstate the employees unlawfully discriminated against and, under certain conditions, to award them back pay. The order further provided for a dismissal of the complaint with respect to the action not found to be unlawful.

The Board's Decision and Order were issued on August 26, 1960, at approximately 10:30 a.m., East-

ern Daylight Saving Time.[2] Five minutes later, the Union filed, pursuant to Section 10(f) of the Act, in the United States Court of Appeals for the District of Columbia Circuit (Case No. 15,961), a petition to review and set aside those portions of the Board's order adverse to it (Pet. 2a-4a). Thirty-five minutes thereafter (at 11:10 a.m., Eastern Daylight Saving Time), the Company filed a petition in the United States Court of Appeals for the Seventh Circuit (Case No. 13,120), to review and set aside those portions of the Board's order adverse to it (Pet. 11a-14a, 16a).

By letter dated October 12, 1960, the General Counsel of the Board notified the Clerk of the Court of Appeals for the District of Columbia Circuit and all parties that the Board had determined that the petition filed in that court "was the one which was first filed within the meaning of Section 2112(a) of 28 U.S.C." and, accordingly, that the certified list of the material comprising the record would be filed in that court (Pet. 8a-9a). The Board thereupon filed in the Court of Appeals for the District of Columbia Circuit the certified list, an answer denying the allegations of error in the Union's petition to review, and a cross-petition for enforcement of its order against the

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[2] On August 25, 1960, the Board telegraphically advised all parties to the proceeding that the Board's decision and order "shall be simultaneously issued by hand in Washington, D.C. to the parties and the press on Friday, August 26, 1960, at 10:30 a.m." At approximately 10:30 a.m., Eastern Daylight Saving Time, on August 26, 1960, the Executive Secretary of the Board, in his office in Washington, D.C., physically handed representatives of both the Company and the Union copies of the Board's Decision and Order.

Company (Case No. 16,031) (Pet. 4a-7a). The Board also filed a motion in the Seventh Circuit that the Company's petition be transferred to the District of Columbia Circuit pursuant to 28 U.S.C. 2112(a) (Pet. 16a).

On October 24, 1960, the Company moved the Court of Appeals for the District of Columbia Circuit: (a) to consolidate Cases No. 15,961 and 16,031, (b) for leave to intervene in Case No. 15,961; and (c) to transfer both proceedings to the Court of Appeals for the Seventh Circuit. On November 23, 1960, the court granted the Company's motions to consolidate and for leave to intervene, but denied the motion to transfer the proceedings (Pet. 1a, 10a). On December 7, 1960, the Company filed a petition for rehearing *en banc* of the court's denial of its motion to transfer (Pet. 10a). On January 9, 1961, the court denied the petition for rehearing *en banc* (Pet. 2a). On January 18, 1961, the Court of Appeals for the Seventh Circuit transferred Case No. 13,120 to the Court of Appeals for the District of Columbia Circuit, pursuant to 28 U.S.C. 2112(a) (Pet. 16a-17a).

ARGUMENT

The petitioner seeks review of an interlocutory order of the Court of Appeals for the District of Columbia Circuit denying a motion to transfer to the Seventh Circuit proceedings to review an order of the National Labor Relations Board. It does not deny the jurisdiction of the court below; its sole argument is that, in the circumstances of this case, the court should have exercised its discretion in favor of, in-

stead of against, transfer. We submit that the petitioner has not shown that the court below abused its discretion in refusing to transfer. In any event, the correctness of the court's refusal to transfer this particular case presents no question warranting review by this Court—especially where, as here, such review is sought before the court of appeals has finally decided the case.

1. Section 10(f) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, 160, gives any "person aggrieved by a final order of the Board" the right to obtain review thereof in either the court of appeals in the circuit where the unfair labor practices were committed or where the person resides or transacts business, or in the District of Columbia Circuit (where the Board has its main office). Two persons were aggrieved by the Board's order in this case—the Company and the Union—and each petitioned for review in a different circuit. Title 28 U.S.C. 2112(a) provides that, where multiple petitions are filed, the agency "shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted", and the other courts shall transfer their proceedings to the court "in which the record has been filed." The statute further provides, however, that: "For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals."

The Board filed the record in the District of Columbia Circuit because the petition to review had been

filed there 35 minutes before the petition had been filed in the Seventh Circuit. Regardless of whether the Board was required to file in the District of Columbia Circuit (see *infra*, pp. 9-11), the petitioner does not, and cannot, deny that the court below thereupon acquired jurisdiction. For Sections 10(e) and 10(f) of the National Labor Relations Act (29 U.S.C. 160(e), (f)) provide that the court of appeals acquires "jurisdiction of the [review] proceeding" upon the filing of the record. The only question before this Court, therefore, is whether the court below abused its discretion, invoked by the petitioner under Section 2112(a), in refusing to transfer.

We submit that the court of appeals acted well within its discretion in declining to transfer the case. The primary factors for transfer urged by petitioner (Pet. 11) are that the Union and the Company reside within the Seventh Circuit; that the employees involved work and reside there; that the alleged unfair labor practices occurred there; and that principal counsel for the Company resides and practices there. But these factors have little significance in Board review and enforcement proceedings, since the court of appeals is called upon to determine the validity of the Board's order upon the basis of a record that has already been completed; the court itself does not receive evidence or hear witnesses. On the other hand, the Union was aggrieved by the Board's order in a substantial way and its petition brought up an important portion of the case for review (see pp. 3-4,

supra). Section 10(f) of the Act gave it the right to obtain review of its contentions in the District of Columbia Circuit. Appellate counsel for all parties have their offices in the District of Columbia. In these circumstances, the court below was justified in concluding that the reasons for retaining jurisdiction of the case overbalanced, or at least equaled, those for transferring the case to another court. To put it differently, petitioner had not made a sufficient showing that the transfer would be "[f]or the convenience of the parties in the interest of justice" to warrant overturning the Union's statutory right to obtain review in the District of Columbia Circuit.

2. There is no merit to petitioner's contention (Pet. 9, 12-14) that the refusal of the court below to transfer the case to the Seventh Circuit rested on the view that the Court of Appeals for the District of Columbia Circuit does not have the same power to transfer as do the other circuits. There is nothing in the brief orders of the court below that supports this contention; on the contrary, the contention is directly refuted by the recent order of that court granting a motion to transfer in the *Butcher Boy Refrigerator Door Company* case, where petitions to review the same Board order were filed in both the District of Columbia and in the Seventh Circuits (Pet. 20a-21a).

Nor is there any warrant for petitioner's suggestion (Pet. 15) that an intra-circuit conflict exists within the court below on this issue. The argument is predicated upon the fact that the court granted the

motion to transfer in *Butcher Boy*, but denied it in a later case (*Gulf Bottlers, Inc.*) and in the instant case. But all of the judges in the Circuit passed on and denied a petition for rehearing *en banc* in this case, which was predicated on the alleged conflict with *Butcher Boy* (Pet. 2a). Moreover, an examination of the three cases clearly reveals that the different results are attributable, not to a difference in principle, but to the particular facts of each case.[4]

3. This case does not present the problem which the government discussed in its memorandum in *Kerr Steamship Co.* v. *United States*, No. 623, this Term, pending on petition for certiorari. That case, and a related case pending before the District of Columbia Circuit (*Montship Lines, Limited, et al.* v. *Federal Maritime Board and United States*, No. 15783, et al.), involved petitions to review an order

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[4] In *Butcher Boy*, the Board found that the employer violated Section 8(a) (5) and (3) of the Act in certain respects but not in others, and issued a broad remedial order (127 NLRB No. 160, 46 LRRM 1192). The union's petition to review in the District of Columbia Circuit merely challenged the Board's failure to find the additional violations of those sections, which findings could not have affected the scope of the Board's order. In these circumstances, the court below could well have thought that the part of the case initiated before it was too insubstantial to warrant it in retaining jurisdiction. On the other hand, here and in *Gulf Bottlers* (where the union's petition to review challenged the Board's failure to find that the employer had "dominated," rather than merely "assisted," an employee association, 127 NLRB No. 107, 46 LRRM 1097), there was more justification for a retention of the case, since the issues raised by the union's petition to review could have a substantial bearing on the ultimate scope of the Board's order.

of the Federal Maritime Board, which petitions had been filed in different circuits on the same day without notation in either circuit of the time of filing. In the light of that circumstance—an inability to ascertain from the record which petition was filed first—the Government in *Kerr* and *Montship* expressed the view that Section 2112(a) was inapplicable where two petitions were filed the same day. In the present case, where it is clear from the clerks' notation on each petition that the petition in the District of Columbia Circuit was filed first (as the company concedes), the government is of the view that Section 2112(a) applies, and indeed all the parties to this litigation have so understood from its inception. See *Louisville* v. *Savings Bank*, 104 U.S. 469, 474; *Tower* v. *Stimpson*, 175 Fed. 130, 130-131 (D. Mass.); *Matter of Joseph Richardson*, 2 Story 571; Ann. Cas. 1914 C 95, 97. But even if that Section were inapplicable, under controlling principles antedating Section 2112(a) the Board had authority to file the record in the court below, and that court had jurisdiction to entertain the case and to refuse to transfer it. See *Columbia Oil & Gasoline Corp.* v. *Securities and Exchange Commission*, 134 F. 2d 265, 266 (C.A. 3), and the numerous cases there cited. The Company here, seeking transfer under the statute, is in no position to urge its inapplicability; for if the statute is inapplicable, the court below did not err in refusing a transfer sought thereunder. Finally, even had transfer been sought below not under the statute but rather under inherent equity powers, the same discretionary con-

siderations of convenience would have impelled the same denial of transfer, and there would still be no warrant for review here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NATIONAL LABOR RELATIONS BOARD, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER IN REPLY TO OPPOSITION

It was pointed out in the Petition that the Court of Appeals may have rested its denial of the Motion to Transfer either on *forum non conveniens* grounds or on the ground that Section 10(f) of the NLRA gives persons aggrieved

by NLRB orders a right of review in the District of Columbia Circuit irrespective of the convenience of the parties. It is our belief that the factors favoring retention of the case in the District of Columbia are so insubstantial that the decision of the Court of Appeals cannot have been based on an appraisal of the convenience of the parties. In consequence, we believe that the Court's decision rested upon the second ground stated above, namely, that the Union has a statutory right of review in the District of Columbia Circuit which is unaffected by *forum non conveniens* considerations. Apparently, the Board and the Union recognize that, if the Court of Appeals did decide the case on the ground suggested by petitioner, the issues presented by the Petition are of vital importance in the administration of the review and enforcement provisions of the National Labor Relations Act (29 U.S.C. § 160 (e) and (f)) and of 28 U.S.C. § 2112 (a). In consequence, the respondents both insist that the denial of the Motion was based on *forum non conveniens* grounds. It is apparent that respondents hope, by this contention, to minimize the importance of the questions presented by the Petition.

We point out in the Petition (Pet. 9-10), however, that the technique which has been devised by unions aggrieved by NLRB orders for vesting 2112 (a) jurisdiction in the District of Columbia Circuit lends peculiar importance to the criteria which that Court has developed for application of the Section. Here, both the Union and the Board concede that the only "convenience" factors favoring retention of the case in the District of Columbia are the location here of the offices of appellate counsel for the Union, associated counsel for the Company, and the Associate General Counsel of the Board who has general supervision over proceedings to enforce NLRB orders. Obviously, the location of the Board's Associate General Counsel does not change from case to case. In consequence, if this is a factor to be considered in balancing the convenience of the

parties,—which we doubt*—it will always weigh in favor of the District of Columbia. Moreover, because the Board's offices are located in the District of Columbia, it is the customary, if not invariable, practice of persons involved in proceedings before the Board to retain associate District of Columbia counsel.** Thus, of the factors on which the Board and the Union rely, only the fact that the Union's principal appellate counsel maintains offices here distinguishes this case from virtually every other NLRB review proceeding. A holding, therefore, that the District of Columbia Circuit is a permissibly "convenient" forum for this case means that persons desiring to maneuver agency review proceedings into this Circuit can do so by the simple expedient of retaining appellate counsel who practice here. Neither the terms nor the legislative history of 28 U.S.C. § 2112 (a) affords even an iota of support for such a construction of the Section.

We submit that if this is, indeed, the convenience criterion which the District of Columbia Circuit found to be controlling in the *Kohler* case and in the previous *Gulf Bottlers* case (Pet. 9, Notes 1 and 2), then prompt review and correction by this Court are im rative. We further submit that the insubstantiality of the *forum non conveniens* factors relied on by the Union and the Board to justify the decision of the Court of Appeals demonstrate the improbability that that Court decided the Motion on those grounds.

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* The purpose of 28 U.S.C. § 2112 (a) was in part to prevent forum shopping by Government agencies. It is for this reason that agencies are required to file their record in the Court first acquiring jurisdiction over a proceeding. To recognize the convenience of Government counsel as a factor in making the forum selection under 2112 (a) seems inconsistent with this Congressional purpose.

** We believe this practice to be sufficiently well known—not only as it relates to NLRB proceedings but as it relates to other Government agencies and boards having their principal office in the District of Columbia—to come within the scope of judicial notice.

The *Butcher Boy Refrigerator Door Company* case—in which the District of Columbia Circuit did grant a Motion to Transfer—does not help the respondents. If, as the Board maintains, the Union was not substantially aggrieved by the order of the Board in *Butcher Boy*, the allowance of the Motion there is the equivalent of a dismissal of the appeal. As such, it is entirely consistent with our view that the Court of Appeals does not consider itself bound by *forum non conveniens* considerations when applying 28 U.S.C. § 2112 (a) to cases arising under Section 10 (f) of the NLRA. If, on the other hand, the Union was truly aggrieved in *Butcher Boy*, then the case conflicts directly with the later *Kohler* and *Gulf Bottlers* cases in which motions to transfer were denied.

Respondent Union makes much of the argument that a plaintiff is normally entitled to the benefit of his own choice of forum. The point has no relevance here. To the extent that persons aggrieved by NLRB orders can be analogized to plaintiffs, there are two "plaintiffs" in this case; the Union in the D. C. Circuit and the Company in the Seventh. Both cannot be accommodated in their choice of forum. It was to guide the Courts in determining which of two "plaintiffs" should lose the benefit of his choice that Congress enacted 28 U.S.C. § 2112 (a).

The respondent Union further contends that denial of transfer was justified here because of the existence of a precedent in the Seventh Circuit which is unfavorable to the Union.*** The argument assumes that there exists in the 2112 (a) Court something akin to certiorari jurisdiction under which that Court determines preliminarily whether the transferee court would dispose of the case properly. It is obvious that there is no room for such a function where courts of equal dignity are charged with equal responsibility for the development of the law under a unitary statute.

*** Goodman Co. v. NLRB, 234 F. 2d 775; *cert. den., sub nom.* United Electrical Workers v. Goodman Co., 352 U. S. 872.

CONCLUSION

The procedure employed in the *Gulf Bottlers, Butcher Boy,* and *Kohler* cases creates a vital role for the District of Columbia Circuit under 28 U.S.C. § 2112 (a),—particularly as that Section interrelates with Section 10 (f) of the National Labor Relations Act. Whatever the ground of decision, it is apparent that the Court of Appeals presently construes 28 U.S.C. § 2112 (a) and Section 10 (f) to permit retention of cases in the District of Columbia on a minimal showing of nexus between the case and this jurisdiction. This can only encourage the initiation of review proceedings in the District of Columbia for just such reasons as the existence of unfavorable precedents in the Circuit of origin. We believe that such a construction of 28 U.S.C. § 2112 (a) and Section 10 (f) presents for consideration by this Court questions of sufficient importance in the administration of both Sections to justify the exercise of certiorari jurisdiction.

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